Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM B. YOUNG, JR., *et al.*,
Petitioners,

v.

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE
of The Straphangers Campaign
in support of Petition for Certiorari

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THE INTEREST OF THE AMICUS CURIAE *

The Straphangers Campaign is a coalition of neighborhood groups and concerned citizens working for improved transportation for all New York City

* Letters of consent to the filing of the within amicus brief are being lodged with the Clerk of the Court simultaneously with the filing of this brief.

residents, particularly in the subway system operated by the New York City Transit Authority. It is a project of the New York Public Interest Research Center, Inc., a not-for-profit corporation. Among its many activities is a twice-yearly survey of subway performance, which it conducts with the assistance of hundreds of volunteers. Based upon the observations of these volunteers, the Straphangers Campaign prepares a semi-annual report on subway performance which includes detailed statistics on delays, the number of breakdowns, the availability of signs, maps and lighting, the presence of graffiti on or in subway cars and other indicia of the quality of the Transit Authority's performance.

The Campaign routinely and frequently distributes massive

quantities of flyers to riders in the subways on a wide array of issues related to the quality of transit service, including transit fares, decisions by the state legislature and federal government to fund new cars or transit repairs and subway crime. We have also commented often on the desirability of allowing First Amendment activities within the New York City subway system, including the distribution of informational flyers and performances by musicians. In particular, we have insisted that the Transit Authority must tailor any restriction of First Amendment activities as narrowly as possible and the restriction must be no greater than necessary to meet the Transit Authority's legitimate transit concerns. Our reports have been widely distributed

and discussed and have been instrumental in effecting changes within the system.

We believe that the decision of the Second Circuit sought to be reviewed is contrary to the interests of the ordinary subway rider in that it erroneously suggests that the subway system is not a public forum, thereby laying the foundation for still further restrictions on the availability of information to riders. Since we believe that subway riders, like all Americans, benefit from the fullest range of First Amendment activities, we submit this amicus brief to urge this Court to review this aspect of the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS IMPROPERLY HELD THAT THE SUBWAY SYSTEM IS NOT A TRADITIONAL OR DESIGNATED PUBLIC FORUM.

The Court below stated that the subway system is not a traditional or designated public forum. It assumed that the subway system was not analogous to streets, parks or other open areas of a municipality and therefore was not a traditional or "quintessential public forum[]" within the meaning of Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Further, the Court specifically held that the subways were not designated as a public forum even though the Transit Authority had permitted a wide range of other expressive activities within the system, including

solicitation for registered charities and political or religious causes. Based upon its view that the subways were not any type of public forum, the Court upheld the blanket ban involved in this case.

It is the position of the Amicus that the Court below was fundamentally wrong in its discussion of the nature of the subway system. The fact is that the subway system is a vast underground network consisting of 23 separate subway lines travelling over hundreds of miles of track. There are 465 separate stations where people enter the system. Some station entrances open into vast underground tunnels travelling underneath the city streets, with wide plazas and ample space for expressive activities. Some of these underground

tunnels or plazas have entrances into shops, stores or restaurants.

For example, the Times Square station has several mezzanines connecting various subway lines, with broad open areas, a 24-hour newsstand, a music store and several shops easily accessible from the promenades. The Broadway/Lafayette station has a broad plaza as does the Rockefeller Center station which also opens to many shops. A wide promenade runs underground from Seventh to Eighth Avenue along 42d Street, and wide underground pedestrian tunnels and walkways are found in other stations.

As even this brief description indicates, the New York City subway system is functionally equivalent to the streets, parks and open areas of previous generations. It is a place

where 1.75 million city dwellers interact with each other every single day, and we believe that there is no other place in New York City where such a great concentration of citizens can be found. The Second Circuit therefore should have found that the New York City subway system is a traditional public forum for expressive activities.

Moreover, New York law has declared the subways to be a public forum. New York Rapid Transit Law § 31(e) specifically provides that the subways "shall be and are deemed to be a part of the public streets of the city, to be used and enjoyed by the public subject to such reasonable rules and regulations as may be imposed." The New York Court of Appeals has also recognized that transit facilities are the functional equivalent of the streets of a city. In

People v. Bright, 71 N.Y.2d 376, 387, 526 N.Y.S.2d 66, 72 (1988), the Court held that a law prohibiting loitering in a transportation facility (such as a train station or bus terminal) was unconstitutional because:

> "Thousands of commuters, shoppers and other people enter these terminals for a wide variety of reasons daily... Pennsylvania Station is .... something of a small, indoor city. These facilities are not places of restricted access [like schools or waterfront facilities]."

A transportation facility does not lose its quality as a public forum simply because a rider has deposited a token into a turnstile. The same millions of ordinary citizens who move through the City streets continue to move through the subway system, often in wide plazas and mezzanines below the surface on the other side of the turnstiles, and with ample room for expressive activities.

Given these facts, it should be clear that the subways are a public forum both by tradition and statutory designation. Accordingly, only a showing of a compelling state interest advanced through the least restrictive means can justify a blanket prohibition on any specific First Amendment activity in the subways. See Frisby v. Schultz, 108 S. Ct. 2495, 2500 (1988). Thus, a total ban on expressive activity cannot be justified when the Transit Authority has made no effort to tailor its regulations narrowly, cf. B40.

The Court of Appeals further erred in its refusal to acknowledge that the subway system is a designated public forum in view of the wide range of expressive activities the subway administrators permit. The Second Circuit's conclusion that the government

may permit solicitation for one purpose in a designated public forum but not others is simply wrong.

There is nothing in this Court's precedents, including its decision in United States v. Kokinda, 110 S. Ct. 3115 (1990), to support that view. Kokinda is distinguishable for at least three reasons. First, the government had not explicitly decreed the post office sidewalk at issue to be a public forum, as New York State did here in Section 31(e) of its Rapid Transit Law. Second, the regulation challenged in Kokinda barred all solicitation for funds, not solicitation for one purpose while at the same time allowing solicitation for other purposes. Third, there was no majority opinion in Kokinda supporting the proposition that selective access to a designated public forum for some

messages can be permitted while another message is prohibited.

That is not to say that the Transit Authority cannot impose reasonable and content-neutral time, place and manner restrictions, after a proper showing has been made that the restriction is narrowly tailored to meet the Transit Authority's legitimate concerns. For example, Transit Authority rules can -- and do -- prohibit leafleting that interferes with pedestrian traffic. But the decision below, which suggested that a blanket ban can be imposed on begging, erred in its premise that the subways are not a public forum.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: New York, N.Y.
November 7, 1990

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